(2) Supreme Court, U.S.
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No.

In the Supreme Court of the United States

PATRICK A. DAY,

Petitioner,

v.

JAMES V. CROSBY, JR., SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

28 U.S.C. § 2244(d) establishes a one-year limitations period for federal habeas corpus petitions filed by state prisoners. When Patrick Day filed his federal habeas petition, the magistrate judge examined it as required by Habeas Rule 4 and ordered the State to respond. In its answer, the State did not raise a limitations defense. Instead, it expressly conceded that Day's petition was timely. Nevertheless, almost a year after the petition was filed and seven months after the parties finished briefing the merits of Day's claims, the magistrate judge recommended *sua sponte* that the petition be dismissed as untimely. The district court adopted that recommendation and the Eleventh Circuit affirmed. Acknowledging a conflict with decisions of the Sixth and Ninth Circuits, the Eleventh Circuit held that the State's failure to plead limitations was not a waiver and that Rule 4 – contrary to its plain text – authorizes a court to dismiss a habeas petition *sua sponte* after an answer has been filed.

This case presents the following important questions on which the courts of appeals are divided:

1. Does the State waive a limitations defense to a habeas corpus petition when it fails to plead or otherwise raise that defense and expressly concedes that the petition was timely?

2. Does Habeas Rule 4 permit a district court to dismiss a habeas petition *sua sponte* after the State has filed an answer based on a ground not raised in the answer?

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PETITION FOR A WRIT OF CERTIORARI

Patrick A. Day respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 391 F.3d 1192. The report and recommendation of the magistrate judge (App., *infra*, 8a-15a) and the order of the district court adopting that recommendation and dismissing the petition (*id.* at 7a) are unreported.

JURISDICTION

The court of appeals' judgment was entered on November 29, 2004. Justice Kennedy extended the time for filing a petition for writ of certiorari to March 30, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2244(d) provides in relevant part:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. This limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> * * * * *

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT

The fundamental issue in this case is whether a State waives the statute of limitations defense of 28 U.S.C. § 2244(d) by failing to assert it in the district court. In this case, the State did not plead the defense or otherwise bring it to the court's attention. To the contrary, it expressly conceded that the habeas petition was timely. Nevertheless, almost a year after the petition was filed, the court dismissed it *sua sponte* as untimely.

The Eleventh Circuit's decision affirming the dismissal acknowledged that other circuits have reached a contrary result. Specifically, the Eleventh Circuit took a position on the minority side of two important questions that have divided the courts of appeals.

First, it held that although a failure to plead limitations waives that defense under the Federal Rules of Civil Procedure, that result does not apply to habeas cases governed by AEDPA. This holding is contrary to decisions of the Third, Sixth, Ninth, and Tenth Circuits that the State waives AEDPA's limitations defense by failing to assert it.

Second, the Eleventh Circuit held that Habeas Rule 4 empowers the district court to dismiss a petition as untimely *sua sponte* even after the State files an answer that does not raise a limitations defense. In contrast, the Sixth and Ninth Circuits have concluded that the plain text of Rule 4 does not authorize *sua sponte* dismissals after the court orders the State to file an answer.

As this Court recognized in the context of another habeas defense, there is significant "uncertainty in the lower courts as to whether, or just when, a habeas court *may* consider a [defense] that the State at some point has waived, or failed to raise." *Trest* v. *Cain*, 522 U.S. 87, 90 (1997). This uncertainty has reached the point of open conflict with respect to the limitations defense. The Court should take this opportu-

nity to resolve the disagreements among the lower courts on these important and recurring issues.

A. Rules Governing Limitations

When a state prisoner files a petition for a writ of habeas corpus in federal court, one defense that the State may assert is limitations. Under 28 U.S.C. § 2244(d)(1), the prisoner has one year from the date his conviction and sentence become final on direct review to file a federal habeas petition. The courts of appeals have held that direct review is complete – and the limitations period begins to run – upon either the conclusion of certiorari proceedings in this Court or the expiration of the 90-day period for seeking certiorari.[1] If the prisoner later files an application for state post-conviction review, the federal limitations period is tolled while that application is "pending." 28 U.S.C. § 2244(d)(2).

If a state prisoner's petition is untimely under this statute, the judge may dismiss it summarily before ordering the State to file an answer. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rule 4") provides that a habeas petition "shall be examined promptly by the judge * * *. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief * * *, the judge shall make an order for its summary dismissal * * *. Otherwise the judge shall order the respondent to file an answer * * *."[2]

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[1] *E.g.*, *Locke* v. *Saffle*, 237 F.3d 1269, 1272-73 (10th Cir. 2001); *cf. Clay* v. *United States*, 537 U.S. 522, 524-25, 527 (2003) (reaching same conclusion under § 2255).

[2] The quoted language is from the rule in force at the time of the lower courts' decisions. The rule was amended effective December 1, 2004. According to the Advisory Committee notes, no substantive change was intended regarding the quoted portion of the rule.

When the judge orders the State to file an answer, the Federal Rules of Civil Procedure apply to the extent they are not inconsistent with the Habeas Rules. See Habeas Rule 11. The Civil Rules provide that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively * * * statute of limitations * * * and any other matter constituting an avoidance or affirmative defense." Fed. R. Civ. P. 8(c). Similarly, the rules require that "[e]very defense, in law or fact, to a claim for relief in any pleading * * * shall be asserted in the responsive pleading thereto if one is required * * *." Fed. R. Civ. P. 12(b).

As the Eleventh Circuit acknowledged, a party's failure to plead an affirmative defense such as limitations constitutes a waiver of that defense. App., *infra*, 4a. In this case, Day contends – and other circuits agree – that the State waived any limitations defense by failing to assert it in the district court.

B. Day's Trial And Direct Appeal

The events relevant to the issue of limitations begin with Day's trial and direct appeal. For the Court's convenience, a timeline of significant dates appears in the Appendix at page 16a.

Day was indicted for first-degree murder and tried in the Circuit Court of Escambia County, Florida. In September 1998, the jury convicted him of second-degree murder and found he carried a weapon during the offense. Ex. A-3.[3] Although the sentencing range for this crime was approximately 21-35 years, the trial judge departed upward and sentenced Day to 55 years in prison. The judge based this sentence on

[3] Relevant materials regarding Day's trial, direct appeal, and state post-conviction motion were attached as exhibits to the State's federal habeas corpus answer (Dkt. No. 7). In this petition, all citations to "Ex." refer to exhibits to the State's answer unless otherwise noted.

his own findings that (1) Day's record indicated an escalating pattern of criminal conduct, and (2) Day engaged in an elaborate cover-up of the crime. Ex. C; Ex. D at 3.

The public defender appealed Day's sentence to Florida's First District Court of Appeal. On December 21, 1999, the court of appeal affirmed in an unpublished opinion. Ex. G. It rejected the trial judge's first reason for departure, holding that Day's record did not show an escalating pattern of criminal conduct. As to the second reason, although the Florida Supreme Court had held that efforts to cover up a murder were not a valid ground for departure,[4] the court of appeal concluded that Day's trial counsel did not preserve that argument. Thus, the court presumed that the second reason was valid and upheld Day's sentence.

Day did not file a petition for a writ of certiorari asking this Court to review the court of appeal's decision.[5] His last day to do so was March 20, 2000. See Sup. Ct. R. 13.

C. State Post-Conviction Review

On March 9, 2001, Day filed a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. Ex. I. The *pro se* motion alleged several claims of in-

[4] *Smith* v. *State*, 620 So. 2d 187 (Fla. 1993) (per curiam); *Connelly* v. *State*, 704 So. 2d 590, 591 (Fla. 4th DCA 1997); see also *Rendon* v. *State*, 690 So. 2d 645, 647-48 (Fla. 4th DCA 1997) (discussing continued validity of *Smith*).

[5] Because the court of appeal was the highest state court in which a decision could be had, this Court had jurisdiction to review that decision by writ of certiorari. 28 U.S.C. § 1257(a); see Fla. Const. art. 5, § 3(b) (limiting Florida Supreme Court review to, *inter alia*, certified questions or express conflict with other decisions); *Ibanez* v. *Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994) (granting certiorari when petitioner had no right of review in Florida Supreme Court); *Nash* v. *Fla. Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967) (same).

effective assistance by trial counsel. The state trial court denied the motion, Ex. J, and Day appealed that decision to the First District Court of Appeal.

On October 9, 2002, the court of appeal affirmed the denial of Day's motion without opinion. Ex. O. Day filed a motion for rehearing, which was denied on November 15. Dkt. No. 13.[6] The court of appeal issued its mandate on December 3, 2002. Ex. P. Day did not file a certiorari petition with this Court, and his last day to do so was February 13, 2003. Sup. Ct. R. 13.3.

D. The District Court Dismisses Day's Federal Petition *Sua Sponte*

Instead, Day drafted a federal petition for a writ of habeas corpus, which he provided to the prison authorities for mailing on January 8, 2003.[7] Dkt. No. 1. Day's *pro se* petition generally repeated the claims of ineffective assistance raised in his state post-conviction motion.

The magistrate judge examined the petition as required by Habeas Rule 4 and determined that it was "in proper form." Dkt. No. 4. She ordered the State to file an answer within 45 days. Consistent with Habeas Rule 5, the order stated that the answer should address whether Day had exhausted his state remedies and, if not, whether those remedies were still available. The order also provided that these defenses would be waived if not raised in the answer.

On March 19, 2003, the State filed an answer. Dkt. No. 7. The State did not assert the limitations bar of 28 U.S.C.

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[6] In this petition, documents filed in the district court are cited by docket number.

[7] The courts of appeals have applied the "prison mailbox" rule of *Houston* v. *Lack*, 487 U.S. 266, 270 (1988), to determine the date on which a prisoner's habeas corpus petition is filed. *E.g.*, *Noble* v. *Kelly*, 246 F.3d 93, 97-98 (2d Cir. 2001) (per curiam).

§ 2244(d) in its answer or in any other district court filing. Moreover, its answer expressly stated that "Respondent agrees the petition is timely; filed after 352 days of untolled time." Dkt. No. 7, at 3. The State then spent 28 pages addressing the merits of Day's ineffective assistance claims.

The magistrate judge allowed Day to file a reply, which he did on April 2, 2003. Dkt. No. 9. In June, the case was referred to a different magistrate judge.

On December 11, 2003, over eleven months after the petition was filed and seven months after the parties finished briefing the merits of Day's claims, the magistrate judge issued an order stating that the petition was untimely and requiring Day to show cause why it should not be dismissed, Dkt. No. 11. Day responded that his petition was timely for three reasons: (1) the State's answer agreed it was timely; (2) the statutory tolling period included the time for seeking certiorari on state post-conviction review; and (3) the public defender who handled his direct appeal refused to provide him with the trial transcript for almost a year. Dkt. No. 13.

The magistrate judge disagreed with these reasons and issued a report recommending that Day's petition be dismissed. App., *infra*, 8a-15a. The judge noted that 353 days had elapsed between the expiration of the time for seeking certiorari on direct review (March 20, 2000) and the beginning of the tolling period for state post-conviction review (March 9, 2001). He stated that Eleventh Circuit precedent excluded from this tolling period the time for seeking certiorari on state post-conviction review. Thus, the judge held that tolling ended when the court of appeal issued its mandate on December 3, 2002, and that the one-year limitations period expired 12 days later on December 16, 2002. Because Day's petition was not filed until January 8, 2003, it was 23 days late. The judge concluded that Day's difficulty obtaining the transcript did not warrant equitable tolling and recommended dismissal of the petition.

Day filed a timely objection to the magistrate judge's report and recommendation, but the district court adopted the report and dismissed his petition. App., *infra*, 7a. The court also denied Day a certificate of appealability. The Eleventh Circuit, however, granted him a certificate to determine "[w]hether the district court erred in addressing the timeliness of appellant's habeas corpus petition * * * after the appellee had conceded that [it] was timely." Dkt. No. 41.

E. The Eleventh Circuit Affirms, Noting A Circuit Split

On appeal, the Eleventh Circuit affirmed the dismissal. App., *infra*, 1a-6a. The court began by reviewing the dates relevant to the issue of limitations. It agreed with the magistrate judge that the tolling period ended when the court of appeal issued its mandate affirming the denial of state post-conviction relief, not when Day's time to seek certiorari review of that decision expired. *Id.* at 2a-3a. Thus, it held that the petition was 23 days late, making the state's concession of timeliness "patently erroneous." *Id.* at 2a, 4a.

Turning to the State's failure to assert the limitations bar below, the court observed that limitations is an affirmative defense that is waived if not pleaded "[i]n an ordinary civil case." *Id.* at 4a. It concluded that habeas cases are not controlled by this rule, however. Relying on circuit precedent, the court held that even after the State files an answer that does not plead limitations, Habeas Rule 4 allows the district court to dismiss the petition as untimely *sua sponte*. *Id.* at 4a-5a.

The court acknowledged that the Sixth and Ninth circuits had "reached a contrary result," ruling that a district court lacks the power to cure *sua sponte* the State's waiver of a limitations defense. App., *infra*, 6a (citing *Scott* v. *Collins*, 286 F.3d 923, 930 (6th Cir. 2002); *Nardi* v. *Stewart*, 354 F.3d 1134, 1141-42 (9th Cir. 2004)). It concluded, however, that "our precedent * * * is binding and requires us to part with the Sixth and Ninth Circuits." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THERE ARE EXPRESS CONFLICTS IN THE CIRCUITS ON WHETHER HABEAS RULE 4 ALLOWS A COURT TO CURE THE STATE'S WAIVER OF A LIMITATIONS DEFENSE.

There are two reasons why Day's petition should not have been dismissed as untimely after the State failed to raise the one-year limitations period of 28 U.S.C. § 2244(d). *First*, the State waived this limitations defense by not asserting it in the district court. *Second*, Habeas Rule 4 does not authorize a court to dismiss a habeas petition *sua sponte* after an answer has been filed. Because both of these issues have divided the courts of appeals, they should be addressed by this Court.

A. The Eleventh Circuit's Decision Conflicts With Holdings Of The Third, Sixth, Ninth, And Tenth Circuits That The State Waives A Limitations Defense By Failing To Raise It.

As the first step in its analysis, the Eleventh Circuit held that although a failure to plead limitations waives that defense in an ordinary civil case, "a habeas case that is governed by AEDPA is not controlled by this rule." App., *infra*, 4a. The First Circuit reached the same conclusion in two unpublished opinions.[8] The Third, Sixth, Ninth, and Tenth Circuits have held, however, that "the [S]tate waives the statute of limitations by failing to raise the defense in its answer." *Nardi*, 354 F.3d at 1141.

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[8] *Saucier* v. *Warden*, 215 F.3d 1312 (table), 2000 WL 739713, at *1 (1st Cir. June 5, 2000) (per curiam) (unpublished) ("[W]hile the state failed to assert the limitations defense in its answer to the petition, we conclude that it has not waived the defense. Given the early stage of proceedings, the state might yet have raised the defense by amending its answer or filing a motion for summary judgment."); see also *Celikoski* v. *United States*, 21 Fed. Appx. 19, 23 (1st Cir. 2001) (per curiam) (unpublished) (same).

Both the Sixth Circuit in *Scott* and the Ninth Circuit in *Nardi* reasoned that there "is no dispute" that AEDPA's "§ 2244(d) statute of limitations defense is an affirmative defense as opposed to a jurisdictional defect." *Scott*, 286 F.3d at 927; *Nardi*, 354 F.3d at 1140. They concluded that the Civil Rules applied to this defense by virtue of Habeas Rule 11.[9] *Scott*, 286 F.3d at 927 n.4. "Accordingly, Federal Rules of Civil Procedure 8(c) and 12(b) require[d] that the [S]tate raise the statute of limitations in its first responsive pleading to avoid waiving the defense." *Nardi*, 354 F.3d at 1140. Because the State had not done so in either case, the courts found the defense waived. *Id.* at 1141; *Scott*, 286 F.3d at 928.

Similarly, the Third Circuit has held that "affirmative defenses under the AEDPA should be treated the same as affirmative defenses in other contexts, and, if not pleaded in the answer, they must be raised at the earliest practicable moment thereafter" to avoid waiver. *Robinson* v. *Johnson*, 313 F.3d 128, 137 (3d Cir. 2002). *Robinson* relied on cases from other circuits recognizing "that a limitations defense may be waived by a State defendant in a habeas proceeding." *Id.* at 134. It also observed that "the limitations provision of the AEDPA is not jurisdictional in nature," concluding that "because the [provision] is subject to equitable modifications such as tolling, it is also subject to other non-jurisdictional, equitable considerations, such as waiver." *Ibid.* The Third Circuit has applied *Robinson* to find waiver when the State does not timely assert a limitations defense in the district court. *Crews* v. *Horn*, 360 F.3d 146, 150 n.2 (3d Cir. 2004); *Stewart* v. *Hendricks*, 71 Fed. Appx. 904 (3d Cir. 2003).

Finally, the Tenth Circuit and a district court in the Seventh Circuit have held that the State waives AEDPA's limitations defense by not raising it in a timely manner. In *Davis* v. *LeMaster*, 216 F.3d 1086 (table), 2000 WL 702408, at *1 n.2 (10th Cir. May 26, 2000) (unpublished), the Tenth Circuit concluded that a habeas petition had not been timely filed. Because the limitations period was not jurisdictional and the State had not raised the issue, however, the court held it had been waived. *Ibid.*; see also *United States ex rel. Galvan* v. *Gilmore*, 997 F. Supp. 1019, 1026 (N.D. Ill. 1998) (same).

[9] Habeas Rule 11 provides that "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." See also n.17, *infra*.

In this case, the State did not assert a limitations defense in its answer or in any other district court filing. To the contrary, the State expressly conceded that Day's petition was timely. Thus, under the law of the Third, Sixth, Ninth, and Tenth Circuits, the State waived the limitations defense and Day's petition would not have been dismissed. The Court should grant certiorari to resolve this conflict among the courts of appeals.

B. The Eleventh Circuit's Holding That Habeas Rule 4 Authorizes *Sua Sponte* Dismissal After An Answer Has Been Filed Is Contrary To Decisions Of The Sixth And Ninth Circuits.

Instead of applying the settled waiver principles of the Civil Rules, the Eleventh Circuit concluded that a State's "failure to plead the [limitations] defense does not bar the district court from raising the issue *sua sponte* and ordering the petitioner to show cause why the petition should not be dismissed." App., *infra*, 4a-5a. It purported to join the Second, Fourth, Fifth, and Ninth Circuits in holding that Habeas Rule 4 authorizes *sua sponte* dismissal even "after the [S]tate has filed a response to the habeas petition that does not raise the statute of limitations as an affirmative defense." *Id.* at 4a. Yet the cases it cited from those circuits held only that Rule 4 allows summary dismissals *before* the State files an answer.[10]

[10] See *Hill* v. *Braxton*, 277 F.3d 701, 703, 705-06 (4th Cir. 2002); *Herbst* v. *Cook*, 260 F.3d 1039, 1041-42 & n.3 (9th Cir. 2001);

In fact, the Ninth Circuit has held that a "district court lacks the authority to *sua sponte* dismiss a habeas petition as time-barred *after* the [S]tate files an answer which fails to raise the statute of limitations defense." *Nardi*, 354 F.3d at 1141 (emphasis added). *Nardi* noted that the plain text of Rule 4 requires a judge to examine the petition promptly and "make an order for its summary dismissal" if "it plainly appears from the face of the petition * * * that the petitioner is not entitled to relief * * *. ***Otherwise*** the judge shall order the respondent to file an answer * * *." Habeas Rule 4 (emphasis added). Thus, the court held that "Rule 4 does *not* authorize a court to dismiss the petition *sua sponte* after ordering the respondent to file an answer." *Nardi*, 354 F.3d at 1141.

Similarly, the Sixth Circuit has held that "[a] district court's ability to dismiss a habeas petition *sua sponte* as an initial matter * * * does not amount to a power to cure *sua sponte* a party's waiver of an affirmative defense." *Scott*, 286 F.3d at 930. *Scott* relied on Rule 4's use of the word "otherwise." It concluded that "Rule 4 gives a district court the ability to dismiss habeas petitions *sua sponte*, but that ability expires when the judge orders a respondent to file an answer or take other appropriate action." *Ibid.* Because the State had answered without pleading a limitations defense, the court of appeals held that the district court's subsequent *sua sponte* dismissal "improperly cured respondent's waiver." *Id.* at 931.

If Day's petition had been filed in the Sixth or Ninth Circuits, the State's failure to assert a limitations defense in its answer – not to mention its concession that Day's petition was timely – would have barred the magistrate judge from

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Acosta v. *Artuz*, 221 F.3d 117, 121-24 (2d Cir. 2000); *Kiser* v. *Johnson*, 163 F.3d 326, 327-29 (5th Cir. 1999); *cf. Scott*, 286 F.3d at 929 & n.7 (noting this distinction).

raising the issue *sua sponte*. This disagreement among the circuits should be addressed by this Court.

C. This Court Should Resolve The Confusion Among The Lower Courts On These Important And Recurring Issues.

In the context of another habeas defense (procedural default), this Court has "recognize[d] some uncertainty in the lower courts as to whether, or just when, a habeas court *may* consider a procedural default that the State at some point has waived, or failed to raise." *Trest* v. *Cain*, 522 U.S. 87, 90 (1997). As the preceding discussion shows, the same uncertainty – and, indeed, open conflict – exists with respect to the limitations defense. The Court should grant certiorari in this case to resolve these express disagreements among the circuits.

Whether a district court may dismiss a habeas petition on limitations grounds after the State fails to raise that defense is a recurring issue on which six circuits have now taken sides. See Parts I.A.-B., *supra*. Thus, the issue is ripe for consideration by this Court.

In addition, the Court has made clear that the questions presented by this petition are important ones worthy of its consideration. In recent years, the Court has agreed to decide several cases about the extent to which the Civil Rules apply to habeas petitions[11] – a topic it addressed last Term in *Banks* v. *Dretke*, 540 U.S. 668, 703-05 (2004). The Court also fre-

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[11] See *Mayle* v. *Felix*, No. 04-563 (whether an amendment of a habeas petition to add a new claim relates back to the date of filing under Fed. R. Civ. P. 15(c)(2) for purposes of the one-year statute of limitations); *Gonzalez* v. *Crosby*, No. 04-6432 (whether a Civil Rule 60(b) motion constitutes a prohibited "second or successive" petition); *Woodford* v. *Garceau*, 538 U.S. 202, 208 (2003) (whether Civil Rule 3 determines when a habeas suit begins).

quently grants certiorari to settle disputes regarding AEDPA's statute of limitations.[12]

Finally, the above disagreements among the courts of appeals have given rise to widespread confusion and uncertainty that this Court needs to dispel. For example, a Third Circuit panel recently undermined *Robinson*'s holding that the State waives limitations by failing to raise it "at the earliest practicable moment." In *Long* v. *Wilson*, 393 F.3d 390, 393 (3d Cir. 2004), the State answered a habeas petition without raising a limitations defense. Nearly one year later, a magistrate judge recommended *sua sponte* that the petition be dismissed as untimely. After the petitioner filed objections with the district court, the State filed a response agreeing with the magistrate's limitations analysis.[13] *Id.* at 395. To avoid the rule of *Robinson*, the court of appeals held that the State's response "in effect made a timely and proper amendment of its answer * * * and that the District Court, in effect, allowed the amendment in its discretion." *Id.* at 399.

Long's tortured reasoning cannot stand together with *Robinson*. As another Third Circuit panel observed, "[o]ur holding in *Robinson* that the limitations defense can be waived by a state respondent effectively forecloses" the argument "that a district court may raise the AEDPA's limitations provision *sua sponte*." *Stewart*, 71 Fed. Appx. at 906.

Decisions of the Fourth and Eleventh Circuits offer further evidence of the lower courts' confusion regarding waiver

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[12] See *Dodd* v. *United States*, No. 04-5286 (when the statute begins to run on a § 2255 motion asserting a new right); *Pace* v. *DiGuglielmo*, No. 03-9627 (whether an untimely state post-conviction petition will toll the statute); *Clay* v. *United States*, 537 U.S. 522, 524-25 (2003) (when the statute begins to run).

[13] *Long* cannot support the result here because the State filed no response to Day's objections and made no other attempt to raise the limitations issue in the district court.

and *sua sponte* consideration of limitations in the habeas context. In *Jones* v. *Nagle*, 349 F.3d 1305, 1308 (11th Cir. 2003), the Eleventh Circuit held that a State waived its limitations defense by failing to dispute the petitioner's equitable tolling argument in the district court. Given the State's similar failure to dispute Day's equitable tolling argument in this case (see p. 7, *supra*), *Jones* supports a finding of waiver here. That result, however, is inconsistent with the Eleventh Circuit's holding below that AEDPA's limitations defense is not controlled by ordinary waiver rules. App., *infra*, 4a.

In addition, the Fourth Circuit recently observed that habeas counsel may wish to avoid pleading unfavorable facts about timeliness in order "to leave open the possibility that the limitations period as an affirmative defense will be waived." *McMillan* v. *Jarvis*, 332 F.3d 244, 248 (4th Cir. 2003) (citing Sixth Circuit decision in *Scott*). Yet it also stated in dicta that "a district court may still raise the limitations period when the [S]tate has failed to do so." *Id.* at 249.

These contradictory statements reveal the lower courts' fundamental uncertainty regarding the nature and waivability of AEDPA's limitations defense. This Court should step in to resolve the confusion.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ELEVENTH CIRCUIT'S DECISION IS CONTRARY TO THE CIVIL RULES AND TO HABEAS RULE 4.

The Eleventh Circuit's decision not only creates an irreconcilable split among the circuit courts, it also directly contravenes rules applicable to civil cases generally and habeas petitions in particular. Under those rules, the State waived AEDPA's statute of limitations defense by failing to include the defense in its answer. The magistrate judge could not cure this waiver because his authority to dismiss the habeas petition *sua sponte* expired when he ordered the State to an-

swer the petition. Interests of comity, finality, federalism, and judicial economy cannot overcome the plain language of the applicable rules; in any event, those interests are sufficiently protected by a court's ability to dismiss a petition *sua sponte* before the State answers. Therefore, this Court should grant certiorari and reverse the Eleventh Circuit's erroneous ruling.

A. Under Civil Rules 8(c) And 12(b), The State Waived The Limitations Defense By Failing To Plead It.

It is well settled that in an ordinary civil case, failure to satisfy a statute of limitations is an affirmative defense, not a jurisdictional defect.[14] Thus, under the Federal Rules of Civil Procedure, a responding party must assert limitations in its responsive pleading. Fed. R. Civ. P. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively * * * statute of limitations * * * and any other matter constituting an avoidance or affirmative defense."); Fed. R. Civ. P. 12(b) ("Every defense * * * shall be asserted in the responsive pleading," except certain specified defenses not including limitations defenses).

If a party fails to raise a limitations defense in the manner required by these rules, that defense is waived.[15] Once

[14] See *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, *like a statute of limitations*, is subject to waiver, estoppel, and equitable tolling." (emphasis added)); *Vega-Encarnación* v. *Babilonia*, 344 F.3d 37, 42 (1st Cir. 2003); *Leavell* v. *Kieffer*, 189 F.3d 492, 494-95 (7th Cir. 1999).

[15] App., *infra*, 4a; 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1278, at 644-45 (3d ed. 2004) ("It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case"); *id.* at n.12 (collecting cases applying this proposition to limitations defense).

waived, the defense is lost because courts generally lack the authority to raise affirmative defenses *sua sponte*.[16]

These rules regarding affirmative defenses in "ordinary" civil cases also apply to section 2254 cases, which are a species of civil litigation. *Slack* v. *McDaniel*, 529 U.S. 473, 479 (2000) ("the Federal Rules of Civil Procedure [are] applicable as a general matter to habeas cases").[17] Indeed, this Court has recognized in several habeas cases that affirmative defenses must be raised timely or they are waived. *Gray* v. *Netherland*, 518 U.S. 152, 165-66 (1996) ("procedural default is an affirmative defense" that the State is "obligated to raise * * * or lose the right to assert the defense thereafter"); *Schiro* v. *Farley*, 510 U.S. 222, 228-29 (1994) ("The *Teague* bar to the retroactive application of new rules is not * * * jurisdictional" and "a State can waive the *Teague* bar by not raising it"); *McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991) ("the government bears the burden of pleading abuse of the writ"); see also *Robinson*, 313 F.3d at 137 ("affirmative defenses under the AEDPA should be treated the same as affirmative defenses in other contexts" with respect to waiver).

[16] See *Hutcherson* v. *Lauderdale County*, 326 F.3d 747, 757 (6th Cir. 2003); *Kropelnicki* v. *Siegel*, 290 F.3d 118, 130 n.7 (2d Cir. 2002) ("The statute of limitations is an affirmative defense that is waived if not raised. As a result, we have held that a district court ordinarily should not raise a statute of limitations defense *sua sponte*." (citations and internal quotation marks omitted)).

[17] See also Habeas Rule 11; Fed. R. Civ. P. 81(a)(2); *Browder* v. *Director*, 434 U.S. 257, 269 (1978); *Henderson* v. *Campbell*, 353 F.3d 880, 898 n.26 (11th Cir. 2003) ("petitions for writs of habeas corpus are governed by the rules applicable in civil cases"); *Kiser* v. *Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) ("where the [Habeas Rules] are silent on an issue, Rule 11 compels us to follow the Federal Rules of Civil Procedure").

Courts agree that AEDPA's statute of limitations – like limitations periods in other civil contexts – "is an affirmative defense that the [S]tate bears the burden of asserting."[18] Therefore, under Civil Rules 8(c) and 12(b), the defense is waived if not asserted in the State's responsive pleading. *E.g.*, *Nardi*, 354 F.3d at 1140-41; *Scott*, 286 F.3d at 927-28. The Eleventh Circuit erred by holding otherwise.

Any remaining doubt whether a respondent in a habeas case waives the limitations defense by failing to plead it disappears upon comparing that defense with the nonexhaustion defense. Congress expressly provided that the "State shall not be deemed to have waived the exhaustion requirement * * * unless the State * * * expressly waives the requirement." 28 U.S.C. § 2254(b)(3). There is no similar provision requiring that a waiver of AEDPA's statute of limitations be express. *Cf. Franklin* v. *Johnson*, 290 F.3d 1223, 1231 (9th Cir. 2002) (holding that State waived procedural default argument by failing to raise it in its responsive pleading because "28 U.S.C. § 2254(b)(3)'s reference to exhaustion has no bearing on procedural default defenses").

Congress knew how to preclude waiver by omission, but it did not do so with regard to AEDPA's statute of limitations defense.[19] See *Nardi*, 354 F.3d at 1141; 2 Randy Hertz &

[18] *Hill* v. *Braxton*, 277 F.3d 701, 705 (4th Cir. 2002); see also *Acosta* v. *Artuz*, 221 F.3d 117, 122 (2d Cir. 2000) ("The AEDPA statute of limitations is not jurisdictional, and nothing in AEDPA or in the 2254 Habeas Rules indicates that the burden of pleading the statute of limitations has been shifted from the respondent to the petitioner. The AEDPA statute of limitations is therefore an affirmative defense * * *."); *Kiser*, 163 F.3d at 329; cases discussed in Part I.A., *supra*.

[19] For this reason, *Granberry* v. *Greer*, 481 U.S. 129 (1987), and similar cases addressing a State's failure to assert a nonexhaustion defense are inapposite. In *Granberry*, the Court noted that the "history of the exhaustion doctrine" shows that courts are not obligated

James S. Liebman, *Federal Habeas Corpus Practice & Procedure* § 22.1, at 933 (4th ed. 2001). Accordingly, the State waived that defense by failing to plead it.

The State also waived the limitations defense for a second, independent reason: it expressly conceded in its answer that Day's petition was timely. Dkt. No. 7, at 3 ("Respondent agrees the petition is timely; filed after 352 days of untolled time."); see *Green* v. *United States*, 260 F.3d 78, 84-85 (2d Cir. 2001) (enforcing express waiver of limitations defense). The Eleventh Circuit attempted to excuse the State from this concession by labeling it "patently erroneous." App., *infra*, 4a. The courts of appeals are divided, however, regarding whether the State's concession was in fact erroneous.

In the Eleventh Circuit's view, Day's petition was untimely because the tolling period for state collateral review ended when the Florida Court of Appeal issued its mandate, not when Day's time to seek certiorari review of that court's decision expired. See p. 8, *supra*; App., *infra*, 16a (timeline). The Sixth Circuit has concluded, however, that the tolling period for review of a state post-conviction application lasts "until the conclusion of the time for seeking Supreme Court review of the state's final judgment on that application independent of whether the petitioner actually petitions the Supreme Court to review the case." *Abela* v. *Martin*, 348 F.3d 164, 172-73 (6th Cir. 2003) (en banc).[20] Under this rule, Day's petition was timely and the State's express concession

to regard the State's omission as an absolute waiver of the claim. *Id.* at 133. The same is not true with regard to the affirmative defense of limitations.

[20] The Sixth Circuit has applied the rule of *Abela* to find several habeas petitions timely that would have been barred under the Eleventh Circuit's view. *E.g.*, *Hudson* v. *Kapture*, 107 Fed. Appx. 466 (6th Cir. 2004); *Freeman* v. *Tibbals*, 83 Fed. Appx. 707 (6th Cir. 2003) (per curiam).

of that fact should have been given binding effect. See App., *infra*, 16a. This disagreement among the circuits further illustrates the importance of the questions presented by this petition.

The Sixth Circuit's sound rule is supported by this Court's cases.[21] In contrast, the Eleventh Circuit's view would produce an unstable limitations scheme and encourage the filing of unnecessary certiorari petitions. *Abela*, 348 F.3d at 171-72. The Court need not resolve this disagreement in order to decide this case, however. Even if the State could be excused from its express waiver of the limitations defense, it nevertheless forfeited that defense by failing to plead it as required by the Civil Rules. See *Scott*, 286 F.3d at 927 n.3 (discussing distinction between waiver and forfeiture). The remaining question is whether the magistrate judge was permitted to undo the State's forfeiture.

B. Habeas Rule 4 Does Not Authorize A Court To Dismiss A Petition *Sua Sponte* After The State Has Answered.

The Eleventh Circuit acknowledged that in an ordinary civil case, a party's failure to plead a statute of limitations defense waives (*i.e.*, forfeits) that defense. Yet it held that habeas cases are an exception to this rule. According to the court, "[t]he critical difference between the ordinary civil case and a habeas case involves Rule 4 of the Rules Governing Section 2254 cases." App., *infra*, 5a.

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[21] See *Clay* v. *United States*, 537 U.S. 522, 525 (2003) (one-year limitations period for § 2255 motion does not start until the time for filing a certiorari petition expires even if no petition is filed); *Carey* v. *Saffold*, 536 U.S. 214, 217, 219-21 (2002) (for tolling purposes, state post-conviction application remains pending during the period between a state court's decision and the litigant's appeal to the next court).

The court attempted to support its holding by quoting one sentence of Rule 4. *Ibid.* The remainder of the rule, however, contains important restrictions that the court ignored. Rule 4, which governs the judge's "[p]reliminary [c]onsideration" of a habeas petition, provides:

> "The original petition shall be presented promptly to * * * [and] examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal * * *. ***Otherwise*** the judge shall order the respondent to file an answer * * *." Habeas Rule 4 (emphasis added).

The plain language of this rule authorizes a district court to dismiss a petition *sua sponte* only as part of the preliminary review it conducts before ordering the State to file an answer. *Acosta* v. *Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) (rule empowers court to "dismiss habeas petitions *prior* to any responsive pleading by the [S]tate" (emphasis added)). The rule's use of the word "otherwise" confirms that considering dismissal and ordering an answer are sequential steps. See Habeas Rule 4 (as amended effective Dec. 1, 2004) ("*If the petition is not dismissed*, the judge must order the respondent to file an answer * * *." (emphasis added)); *Granberry* v. *Greer*, 481 U.S. 129, 135 n.7 (1987) (same). Thus, Rule 4 did not permit the magistrate judge to dismiss Day's petition *sua sponte* nearly one year after ordering the State to file an answer.[22] *Scott*, 286 F.3d at 930 ("the ability to dis-

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[22] Because Rule 4 does not address post-answer dismissals in any manner, much less in a manner inconsistent with the Civil Rules, those rules govern consideration of the limitations defense. See n.17, *supra*. Under the Civil Rules, the State waived the defense. See Part II.A., *supra*.

miss habeas petitions *sua sponte* * * * expires when the judge orders a respondent to file an answer").

This Court has criticized *sua sponte* rulings, including in the habeas context, on the ground that the most fair and efficient way to resolve disputes is through briefing and argument by both parties. See *Trest* v. *Cain*, 522 U.S. 87, 92 (1997). Because habeas is an adversarial remedy, not an inquisitorial one, *sua sponte* consideration of defenses by courts must be carefully confined to the limits of the rules. See *Ulster County Ct.* v. *Allen*, 442 U.S. 140, 154 n.13 (1979) (noting that State was an adversary in habeas litigation); *United States* v. *Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").

Rule 4's distinction between pre- and post-answer dismissals is not an arbitrary one. It reflects the time-honored principle of the Civil Rules that affirmative defenses not asserted in a responsive pleading are waived. If a court could "cure" such waivers by raising defenses *sua sponte*, this aspect of the rules would be meaningless.[23] The Eleventh Circuit erred by departing from the Civil Rules and holding that Rule 4 allowed the magistrate judge to cure the State's waiver.

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[23] *Haskell v. Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988) ("Since [limitations] is a waivable defense, it ordinarily is error for a district court to raise the issue *sua sponte*. Otherwise, the waiver aspect of Rule 8(c) would have little meaning.") (citations omitted); see also *Scott*, 286 F.3d at 930 (*sua sponte* dismissal after State answered "was an impermissible curing of the [State's] waiver").

C. Interests Of Comity, Finality, Federalism, And Judicial Economy Cannot Overcome The Rules' Plain Text And Are Sufficiently Protected By The Power To Grant Pre-Answer *Sua Sponte* Dismissals.

The Eleventh Circuit also attempted to justify *sua sponte* enforcement of AEDPA's statute of limitations on the ground that it "fulfills the purposes of AEDPA" and promotes comity, finality, and federalism. App., *infra*, 5a-6a. Similarly, a few other courts have concluded that *sua sponte* action is appropriate because a habeas proceeding "implicates values beyond the concerns of the parties." *Acosta*, 221 F.3d at 123;[24] see also *Long*, 393 F.3d at 402-04; *Scott*, 286 F.3d at 932-33 (Stafford, D.J., dissenting).

This argument for post-answer *sua sponte* dismissals not only contravenes the plain text of Habeas Rule 4 and Civil Rules 8(c) and 12(b), it also eviscerates the very principle of waiver. See *Haskell v. Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988). The doctrine of waiver assumes that a party is in the best position – better even than the court – to know when its own interests are at stake. This premise is no less true in the context of habeas cases. *Ulster County Ct.*, 442 U.S. at 154; see *Castro* v. *United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.").[25] The Eleventh Circuit erred by disregarding it here.

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[24] In *Acosta*, however, the dismissal occurred before the State answered. 221 F.3d at 119-21.

[25] See also *Esslinger* v. *Davis*, 44 F.3d 1515, 1527-28 (11th Cir. 1995) ("In a given case, * * * the state is in the best position to know whether, in the interest of justice, its rule needs – indeed,

Waiver also prevents litigants from strategically "withhold[ing] * * * a defense until after the 'main event' * * * is over." *Granberry*, 481 U.S. at 132. By authorizing lower courts to cure waiver, the Eleventh Circuit removed this disincentive to strategic behavior.

Moreover, the interests of judicial economy, comity, federalism, and finality are already well protected by a court's ability to dismiss a habeas petition *sua sponte* under Rule 4 before the State has answered. See *Scott*, 286 F.3d at 930 n.10. A petition that, on its face, cannot support relief may be dismissed *sua sponte* as an initial matter. A petition without such plain defects, however, should be subject to the adversarial process, in which it is each party's burden to raise appropriate claims and defenses.[26]

Indeed, if the potential for abuse of the writ of habeas corpus justified *sua sponte* dismissal at any time, this Court would not have held in *McCleskey* v. *Zant* that when a prisoner files a second or successive application, the government bears the burden of pleading abuse of the writ. 499 U.S. at 494. Nor would the Court have held in *Trest* that a court of appeals is not required to raise the issue of procedural default *sua sponte*. 522 U.S. at 89-91. If the interests asserted by the Eleventh Circuit trumped the law applicable to civil litigation generally, then the Court would have placed the burden of determining the viability of habeas petitions on courts rather than State respondents. It did not.

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deserves – federal court vindication. Accordingly, when, as here, the state waives a habeas petitioner's procedural default in failing to obtain appellate review of a claim, the district court should assume that the waiver is justified."); 2 Hertz & Liebman, *supra*, § 22.1, at 937 & n.49.

[26] See *Falconer* v. *Lane*, 905 F.2d 1129, 1135 (7th Cir. 1990) ("waiver is not an obstacle reserved for habeas petitioners alone"); 2 Hertz & Liebman, *supra*, § 22.1, at 933-37 & nn.44-47.

Because the State failed to carry its burden here by raising the limitations defense in the district court, the Eleventh Circuit erred in affirming the dismissal of Day's petition as untimely. This Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2005

APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-10778
Non-Argument Calendar

D. C. Docket No. 03-00015-CV-3-MCR-MD

PATRICK DAY,

Petitioner-Appellant,

versus

JAMES CROSBY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(November 29, 2004)

Before TJOFLAT, DUBINA and PRYOR, Circuit Judges.

PER CURIAM:

Patrick Day, a Florida prisoner, appeals *pro se* the dismissal of his petition for a writ of habeas corpus under 28

U.S.C. section 2254. The district court dismissed Day's petition *sua sponte* after deciding that it was untimely under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), even though the state erroneously conceded that Day's petition was timely. We granted Day a certificate of appealability to determine whether the district court could *sua sponte* dismiss an untimely petition despite a concession of timeliness by the state. We conclude that a concession of timeliness that is patently erroneous does not compromise the authority of a district court to dismiss *sua sponte* a habeas petition that is untimely, under AEDPA, which was enacted to promote finality of state criminal judgments. We affirm.

I. BACKGROUND

On September 3, 1998, Day was convicted of second-degree murder and sentenced to imprisonment for 55 years. After the Florida First District Court of Appeals affirmed Day's conviction and sentence, the limitation period for Day to obtain federal habeas relief began to run on March 20, 2000. On March 9, 2001, Day filed a collateral attack under Florida Rule of Criminal Procedure 3.850, which tolled the limitation period for filing a habeas petition until December 3, 2002, when the First District Court of Appeals issued its mandate for the denial of collateral relief for Day. *See Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000). By then, Day had used 353 of his allotted 365 days under the statute of limitations. He had until December 16, 2002, to file a federal habeas petition, but did not file for federal habeas relief until January 8, 2003, after the statute of limitations had run.

A federal magistrate judge acknowledged that Day's petition was "in proper form" and ordered the state to file an answer. The order directed the state to make all arguments regarding potential failure to exhaust state remedies or procedural default. The order stated that those arguments would be waived if not addressed in the answer, but the order did

not mention the statute of limitations. The answer of the State of Florida erroneously asserted that "[the state] agrees that the petition is timely; [*sic*] filed after 352 days of untolled time" and then addressed Day's substantive arguments. In December 2003, the court *sua sponte* issued an order to show cause why Day's petition should not be dismissed as untimely.

Day made three arguments against dismissal. Day first argued that the court should not dismiss his complaint after it had been pending for a year without any suggestion that it was untimely. Day argued second that he had 90 days from the denial of his motion for rehearing on collateral appeal to file a petition for a writ of certiorari in the United States Supreme Court. Under his calculation, the limitation period for filing his federal habeas petition did not run until 90 days after November 15, 2002. Day's third argument was that the state public defenders withheld his trial transcript for 352 days, and the delay cost him time in which he could have worked toward filing his appeals.

The magistrate judge recommended dismissal of Day's habeas petition. The magistrate judge concluded that *Coates v. Byrd*, which held that the 90-day period for seeking certiorari review in the United States Supreme Court on collateral appeal does not toll the limitations period for filing a federal habeas petition, foreclosed Day's argument. 211 F.3d 1225, 1227 (11th Cir. 2000). The magistrate judge also recommended that Day's argument regarding the trial transcripts did not meet the standard for equitable tolling under section 2244. In his objection to the report and recommendation of the magistrate judge, Day argued for the first time that the concession of timeliness by the state was dispositive.

The district court adopted the magistrate judge's report, dismissed Day's petition, and denied Day's certificate of appealability. We granted a certificate of appealability to determine "[w]hether the district court erred in addressing the

timeliness of appellant's habeas corpus petition, filed pursuant to 28 U.S.C. § 2254, after the appellee had conceded that appellant's petition was timely."

II. STANDARD OF REVIEW

We review *de novo* the dismissal of a habeas petition as time-barred. *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000).

III. DISCUSSION

Two years ago, we held that, after the state has filed a response to a habeas petition that does not raise the statute of limitations as an affirmative defense, a district court may dismiss a habeas petition *sua sponte* because the limitations period of one year, under AEDPA, has expired. *Jackson v. Sec'y for the Dep't of Corrs.*, 292 F.3d 1347, 1349 (11th Cir. 2002). We joined the Second, Fourth, Fifth, and Ninth Circuits and ruled that, "even though the statute of limitations is an affirmative defense, the district court may review *sua sponte* the timeliness of the section 2254 petition." *Id.* (citing *Acosta v. Artuz*, 221 F.3d 117, 124 (2d Cir. 2000); *Hill v. Braxton*, 277 F.3d 701, 706 (4th Cir. 2002); *Kiser v. Johnson*, 163 F.3d 326, 329 (5th Cir. 1999); *Herbst v. Cook*, 260 F.3d 1039, 1042 (9th Cir. 2001)). *Jackson* controls the resolution of this appeal.

This appeal presents a distinction without a difference; there is no meaningful difference between an erroneous failure to plead the statute of limitations as an affirmative defense, as occurred in *Jackson*, and a concession of timeliness that was patently erroneous, as occurred here. In an ordinary civil case, a "failure to plead the bar of the statute of limitations constitutes a waiver of the defense." *Day v. Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012, 1015 (11th Cir. 1997); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1009 (11th Cir. 1989). But a habeas case that is governed by AEDPA is not controlled by this rule. Under *Jackson*, a failure to plead

the defense does not bar the district court from raising the issue *sua sponte* and ordering the petitioner to show cause why the petition should not be dismissed.

The critical difference between the ordinary civil case and a habeas case involves Rule 4 of the Rules Governing Section 2254 cases. That rule states, "If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified." The Fifth, Fourth, and Second Circuits have concluded that "[t]his rule differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses." *Kiser*, 163 F.3d at 328; *see also Acosta*, 221 F.3d at 23; *Hill*, 277 F.3d at 705. The Advisory Committee Notes to Rule 4 state that a federal district court has "the duty . . . to screen out frivolous applications."

In a pre-AEDPA decision, this Court held that, although "in [habeas] cases circumstances may counsel that the district court raise *sua sponte* a procedural bar to relief that the state has 'waived,'" the district court must consider whether the dismissal "serves an important federal interest." *Esslinger v. Davis*, 44 F.3d 1515, 1524 (11th Cir. 1995). *Esslinger* is distinguishable. *Esslinger* concerned procedural default in state court under state law. Here the district court examined the record and determined that the state erroneously conceded the timeliness of a federal statute of limitations. A federal court that sits in collateral review of a criminal judgment of a state court has an obligation to enforce the federal statute of limitations. When it enacted AEDPA, Congress circumscribed our review in habeas cases to promote comity, finality, and federalism, and Congress enacted the AEDPA statute of limitations as the principal tool to "serve[ ] the well-recognized interest in the finality of state court judgments." *Duncan v. Walker*, 533 U.S. 167, 179, 121 S. Ct. 2120, 2128

(2001); *see also Williams v. Taylor*, 529 U.S. 420, 436, 120 S. Ct. 1479, 1490 (2000).

Day brings to our attention that the Sixth Circuit has reached a contrary result. *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2003). In *Scott*, a divided panel of the Sixth Circuit held that "[a] district court's ability to dismiss a habeas petition *sua sponte* as an initial matter (after giving the petitioner notice and an adequate opportunity to be heard) does not amount to a power to cure *sua sponte* a party's waiver of an affirmative defense." *Id.* at 930. The dissent reasoned that because exhaustion and procedural default could be raised *sua sponte*, "[t]here is no reason why the statute of limitations – also an affirmative defense which may be waived by the respondent – should be treated differently." *Id.* at 934 (Stafford, J., dissenting). The Ninth Circuit has followed *Scott*, *Nardi v. Stewart*, 354 F.3d 1134, 1141 (9th Cir. 2004), but our precedent in *Jackson* is binding and requires us to part with the Sixth and Ninth Circuits.

This *sua sponte* dismissal differs significantly from other *sua sponte* rulings that the Supreme Court has criticized. In *Calderon v. Thompson*, the Supreme Court was unanimous as to one point: it refused to "condone" the efforts of a court to recall its own mandate "as a mechanism to frustrate" the requirements Congress imposed under AEDPA. 523 U.S. 538, 569, 118 S. Ct. 1489, 1507 (1998) (Souter, J., dissenting), *accord id.* at 553-54, 118 S. Ct. at 1500-01 (majority opinion). Our decision, in contrast, fulfills the purposes of AEDPA by enforcing its limitation period.

IV. CONCLUSION

A concession of timeliness by the state that is patently erroneous does not compromise the authority of a district court *sua sponte* to dismiss a habeas petition as untimely, under AEDPA. The judgment of the district court is, therefore,

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK A. DAY,
Petitioner,

v. 3:03cv15/MCR/MD

JAMES V. CROSBY, JR.,
Respondent.
_____/

ORDER

This cause comes on for consideration upon the magistrate judge's report and recommendation dated January 6, 2004. The petitioner has been furnished a copy of the report and recommendation and has been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1), and I have made a *de novo* determination of those portions to which an objection has been made.

Having considered the report and recommendation and all objections thereto timely filed, I have determined that the report and recommendation should be adopted.

Accordingly, it is now ORDERED:

The petition for writ of habeas corpus (doc. 1) challenging the conviction and sentence in *State of Florida v. Patrick A. Day*, in the Circuit Court of Escambia County, Florida, case no. 97-4411, is DISMISSED and the clerk is directed to close the file.

DONE AND ORDERED this 21st day of January, 2004.

s/ M. Casey Rodgers
M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

PATRICK A. DAY,
Petitioner,

v. 3:03cv15/MCR/MD

JAMES V. CROSBY, JR.,
Respondent.

REPORT AND RECOMMENDATION

Before the court is a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (doc. 1). Respondent filed an answer (doc. 7), to which petitioner responded (doc. 9). Upon review, it appeared to the undersigned that the petition was time-barred. Accordingly, petitioner was ordered to show cause why his petition should not be dismissed as untimely (doc. 11). Petitioner has responded to the order (doc. 13). The matter is referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636 and N.D. Fla. Loc. R. 72.2(B). After careful consideration of all issues raised by petitioner, it is the opinion of the undersigned that no evidentiary hearing is required for the disposition of this matter, Rules Governing Section 2254 Cases 8(a). It is further the opinion of the undersigned that the pleadings and attachments before the court show that the petition is untimely and should be dismissed.[1]

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[1] The district court has the discretion to raise *sua sponte* the timeliness of a state prisoner's habeas petition. *Jackson v. Secretary for the Dep't of Corrections*, 292 F.3d 1347, 1349 (11th Cir. 2002).

BACKGROUND

In 1997, petitioner was charged with first-degree premeditated murder with a weapon in the Escambia County Circuit Court, case number 97-4411. (Doc. 7, Ex. A-3).[2] He was found guilty by jury verdict of second-degree murder, a lesser included offense. (*Id.*). On October 14, 1998, petitioner was adjudicated guilty of second-degree murder and sentenced to an upward departure sentence of 55 years incarceration. (Exs. B & C). On appeal of his conviction, petitioner challenged only his upward departure sentence (Ex. D). The Florida First District Court of Appeal ("First DCA") affirmed petitioner's sentence in a written opinion filed December 21, 1999. *Day v. State*, 746 So.2d 1219 (Fla. 1st DCA 1999) (Table) (copy at Ex. G).

PROCEDURAL HISTORY

On March 9, 2001 petitioner filed a motion for post-conviction relief pursuant to FLA.R.CRIM.P. 3.850, in which he raised five grounds of ineffective assistance of trial counsel. (Ex. I). The trial court denied the motion in a written order dated February 26, 2002 (Ex. J). That same day, petitioner signed (and filed) an amended motion for post-conviction relief pursuant to FLA.R.CRIM.P. 3.850, in which he raised the previous five grounds and one new ground of ineffective assistance. (Ex. K). The trial court construed the amended motion as a second motion under FLA.R.CRIM.P. 3.850 and, on March 13, 2002, denied relief on the merits (Ex. L, Order Denying Defendant's Second Motion For Post-conviction Relief). Petitioner filed a notice of appeal on March 15, 2002, in which he appealed "the denial of his Motion for Post Conviction relief rendered on February 26, 2002." (Ex. L, Notice of Appeal). The First DCA affirmed the denial order without written opinion on October 9, 2002.

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[2] Hereafter all references to exhibits will be to those attached to Doc. 7 unless otherwise noted.

Day v. State, 833 So.2d 122 (Fla. 1st DCA 2002) (Table) (copy at Ex. O). The mandate issued on December 3, 2002. (Ex. P). Petitioner filed the instant federal habeas petition on January 8, 2003.[3] (Doc. 1).

DISCUSSION

Because petitioner filed this § 2254 petition after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the AEDPA governs the present petition. *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). Pursuant to 28 U.S.C. § 2244, a one-year period of limitation applies to the filing of a federal habeas corpus petition by a person in custody pursuant to a state court judgment. The limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

[3] Although petitioner signed his petition on January 7, 2003, (doc. 1, p. 17), the institutional stamp bearing petitioner's initials indicates that petitioner provided the petition to prison officials for mailing on January 8, 2003 (*id.*, p. 1).

> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

§ 2244(d)(1). According to the tolling provision of § 2244(d), the time during which a "properly filed" application for state postconviction or other collateral review is pending shall not be counted toward any period of limitation. 28 U.S.C. § 2244(d)(2).

In the instant case, petitioner has not asserted that a government-created impediment to his filing existed, that he bases his claim on a right newly recognized by the Supreme Court, or that the facts supporting his claim could not have been discovered through the exercise of due diligence before the filing of this petition. Thus, the statute of limitations must be measured from the remaining trigger, which is the date on which his conviction became final. *See* 28 U.S.C. § 2244(d)(1).

The First DCA affirmed petitioner's conviction on December 21, 1999. Petitioner did not seek review of his conviction in the Florida Supreme Court or in the United States Supreme Court. Thus, the one-year limitations period began to run 90 days after the First DCA's decision issued.[4] *Bond v. Moore*, 309 F.3d 770 (11th Cir. 2002) (for purposes of § 2244(d)(1)(A), the one-year limitations period began to run when the time expired for filing a petition for certiorari with the United States Supreme Court); *Jackson v. Secretary for the Dep't of Corrections*, 292 F.3d 1347, 1349 (11th Cir. 2002); *accord Kaufman v. United States*, 282 F.3d 1336 (11th Cir. 2002) (applying same rule to motion filed under 28

[4] The 90-day period for filing in the United States Supreme Court a petition for a writ of certiorari seeking review of a decision of a state appellate court from the date of the state court's opinion, not the date of issuance of the mandate. *See* SUP. CT. R. 13.3.

U.S.C. § 2255). Accordingly, for purposes of § 2244 petitioner's conviction became final on March 20, 2000, and the § 2244 limitations period began to run.

Calculating the time period from March 20, 2000, 353 days elapsed before petitioner filed his first Rule 3.850 motion. This motion was pending from March 9, 2001 (the date it was filed) until December 3, 2002 (the date the First DCA issued the mandate on petitioner's appeal of the order denying relief).[5] The clock began to run once more on December 3, 2002, and expired 12 days later on December 16, 2002.[6] Petitioner did not file his federal habeas petition until January 8, 2003. Based on the foregoing, the habeas petition is untimely.

In response to the court's show cause order, petitioner argues that his Rule 3.850 motion for post-conviction relief was "pending," within the meaning of § 2244(d)(2), until expiration of the 90-day period in which he could have petitioned the United States Supreme Court for certiorari review of the denial of his motion. The Eleventh Circuit has expressly rejected this argument. *Coates v. Byrd*, 211 F.3d 1225 (11th Cir. 2000) (holding that "the time during which a petition for writ of certiorari is pending, or could have been filed, following denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1)"); *see, e.g., Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (affirming district court's conclusion that a petition for writ of certiorari to the United States Supreme Court does not toll the statute of limitations under

[5] *See Nyland v. Moore*, 216 F.3d 1264 (11th Cir. 2000) (recognizing that a "properly filed" state postconviction petition is "pending" under Florida procedure – and consequently tolls the limitations period – until the appellate court's issuance of the mandate on appeal).

[6] December 15, 2002 was a Sunday. *See* FED.R.CIV.P. 6(a).

§ 2244(d)(2)), *cert denied*, 531 U.S. 1166, 121 S.Ct. 1129, 148 L.Ed.2d 995 (2001).

Additionally, petitioner offers the following explanation for the 353-day delay in filing his first Rule 3.850 motion:

> For 352 days the Petitioner sat in state custody demanding his trial transcripts which were being kept from him by public defenders who were passing it amongst themselves.
>
> Long after the formal appeal was disposed of the public defenders . . . purposly [sic] kept the transcripts from the Defendant. Petitioner needed the trial transcripts for his ineffective claim and filed a complaint with the Florida Bar. No action was taken.

(Doc. 13, p. 2).

It is noted that "[s]ection 2244 . . . permits equitable tolling 'when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.'" *Steed v. Head*, 219 F.3d at 1300 (citing *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999)). Petitioner's assertions are insufficient to justify application of the equitable tolling doctrine. He asserts that he needed his trial transcript in order to prepare his Rule 3.850 motion, and that the public defenders' office ignored his repeated requests for the transcript for 352 of the 353 days the limitations period was running. First, it is noted that nothing in Fla.R.Crim.P. 3.850 requires the movant either to attach a transcript or to provide citations to the transcript. Further, petitioner makes no specific allegation why the trial transcript was necessary in light of the fact that he experienced the full trial. *See e.g., Lloyd v. Vannatta*, 296 F.3d 630, 633 (7th Cir. 2002) ("it is clear that the state's alleged refusal

here to provide Mr. Lloyd with a complete transcript does not justify equitable tolling"); *Donovan v. Maine*, 276 F.3d 87, 93 (1st Cir. 2002) ("the state court's delay in furnishing the petitioner with the transcript did not establish a basis for equitable tolling" where petitioner failed to establish that "he needed that transcript in order to file a federal habeas application"); *Jihad v. Hvass*, 267 F.3d 803, 806 (8th Cir. 2001) ("lack of access to a trial transcript does not preclude a petitioner from commencing post-conviction proceedings and therefore does not warrant equitable tolling"); *Brown v. Cain*, 112 F.Supp.2d 585, 587 (E.D. La. 2000) (one-year limitation period for filing habeas petition would not be equitably tolled, despite petitioner's claim that he had spent much of seventeen month period between conviction and filing of application for post-conviction relief waiting for state to produce transcripts, absent showing that transcripts were needed to file application).

Moreover, even accepting as true petitioner's assertion that he needed the trial transcript, his own allegations suggest that he was able to file his Rule 3.850 motion within a remarkably short time after receiving the transcript – a mere day. Petitioner fails to explain why, with the exercise of that same diligence, he was unable to file his federal habeas petition within the twelve days following issuance of the mandate on his Rule 3.850 appeal. In fact, he alleges *no* facts to suggest that he attempted to file his federal habeas petition within those twelve days, much less that he diligently attempted to do so. The deficiency of petitioner's allegations is highlighted by the fact that petitioner has contended throughout this proceeding that all the grounds raised in his federal habeas petition were raised in his Rule 3.850 motion (see Doc. 1, pp. 5, 7, 8, 10, 11, 13; Doc. 9, p. 2). Because petitioner has not alleged specific facts which if true would entitle him to relief, he is not entitled to a hearing or equitable tolling.

CONCLUSION

The instant petition for writ of habeas corpus is untimely. The record does not support application of the equitable tolling doctrine or any other exception to the limitations period. Based on the foregoing, the petition should be dismissed.

Accordingly, it is respectfully RECOMMENDED:

That the petition for writ of habeas corpus (doc. 1) challenging the conviction and sentence in *State of Florida v. Patrick A. Day*, in the Circuit Court of Escambia County, Florida, case no. 97-4411, be DISMISSED and the clerk be directed to close the file.

At Pensacola, Florida this 6th day of January, 2004.

/s Miles Davis
MILES DAVIS
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Any objections to these proposed findings and recommendations must be filed within ten days after being served a copy hereof. A copy of any objections shall be served upon all other parties. Failure to object may limit the scope of appellate review of factual findings. *See* 28 U.S.C. § 636; *United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988).

APPENDIX D

List Of Dates Relevant To Limitations Issues

Direct appeal

Dec. 21, 1999	Florida Court of Appeal affirms Day's sentence on direct appeal.
March 20, 2000	Last day to file petition for writ of certiorari from court of appeal's decision.

– 353 days –

State post-conviction review

March 9, 2001	Day files motion for post-conviction relief under Florida law.
Oct. 9, 2002	Florida Court of Appeal affirms denial of post-conviction relief.
Nov. 15, 2002	Motion for rehearing denied.
Dec. 3, 2002	Mandate issued.
Feb. 13, 2003	Last day to file petition for writ of certiorari from court of appeal's decision.

Federal habeas review

Jan. 8, 2003	Day mails federal habeas petition.